No. 18-573

IN THE

Supreme Court of the United States

COLONY COVE PROPERTIES, LLC,
Petitioner,

v.

CITY OF CARSON AND CITY OF CARSON MOBILEHOME PARK RENTAL REVIEW BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life. Those principles include the idea, articulated in the Declaration of Independence and codified in the Takings Clause of the Fifth Amendment, that governments are instituted to protect the inalienable rights of citizens, including the right to acquire and use property. In addition to providing counsel for parties at all levels of state and federal courts, the Center has represented parties or participated as amicus curiae before this Court in several cases of constitutional significance addressing the Constitution's protection of property rights, including *Murr v. State of Wisconsin*, 137 S.Ct. 1933 (2017); *Koontz v. St. Johns River Water Management Dist.,* 133 S.Ct. 2586 (2013); *Sackett v. Environmental Protection Agency*, 132 S.Ct. 1367 (2012); and *Kelo v. City of New London*, 125 S.Ct. 2655 (2005).

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[1] Pursuant to the Court's Rule 37.3, this amicus brief is filed with the consent of the parties. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief, and no person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for Amicus Curiae gave each party ten days' timely notice of the intent to file this brief.

SUMMARY OF ARGUMENT

1. The opinion of the Ninth Circuit Court of Appeals is destined to sow confusion in a field of law already renowned for its confusion.[2] In reversing the jury's unanimous finding that the City of Carson and its Mobilehome Park Rental Review Board (collectively, the City) had taken Petitioner Colony Cove's property by changing the rules for rent increases after Colony Cove purchased the property, the City violated clear holdings of this Court and created conflict with holdings of other federal Circuit Courts as well as state appellate courts. The Ninth Circuit's idea that there is only one way to apply the general precepts of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), flies in the face of this Court's consistent call for flexibility. Indeed, in *Penn Central* itself, the Court said flatly that there were no hard and fast rules and it would examine each takings case on its own facts. (438 U.S. at 124.)

2. Aside from disregarding this Court's holdings on flexible application of takings doctrine, the Ninth Circuit ignored the Court's consistent rulings that "temporary" takings are governed by

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[2] Takings law has regularly been criticized by courts and scholars alike. See, e.g., Joseph Sax, *Takings and Police Power*, 74 Yale L.J. 36, 37 (1964) ("a welter of confusing and apparently incompatible results"); Frank Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 Harv. L. Rev. 1165, 1170 (1967 ("liberally salted with paradox").

the same standards as "permanent" takings, so that any time the government takes private property for public use, compensation will be paid. What matters is that a taking has occurred, not the manner in which the taking was accomplished or the size of the taking (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, ---, n. – [1982] [taking was no "bigger than a bread box"], or its duration (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 [1987] [compensation is due for the period of time it took to invalidate the regulation or convince the government to withdraw it]).

3. Finally, although the Ninth Circuit's reach may be vast, courts outside that realm (both state and federal) have flexibly applied the Fifth Amendment's protection against uncompensated takings regardless of the duration or manner of taking. The Ninth Circuit's contrary rule for much of the western United States will cause only conflict and confusion. It needs to be reversed.

ARGUMENT

I
THIS COURT'S FOUNDATIONAL RULE FOR REGULATORY TAKINGS IS ONE OF FLEXIBILITY.

Scholars on both ends of the political spectrum have criticized the decision in *Penn Central.*[3]

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[3] See, e.g., Richard Epstein, Takings—Private Property And The Power Of Eminent Domain 7-18 (1985); John D.

Fundamentally, they have challenged the Court's conclusion that regulatory takings should be judged on a constantly shifting mélange of circumstances analysis. Professor Merrill noted, for example, that "a totality of the circumstances analysis masks intellectual bankruptcy." (Thomas Merrill, *The Economics of Public Use*, 72 Corn. L. Rev. 61, 93 [1986].) Although harsh, that conclusion found resonance in Justice Scalia's conclusion that such analysis renders an appellate court more like a trial court, making equality of treatment "impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated [and] judicial courage is impaired." (Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 [1989].)

In light of such criticism, it would be appropriate for the Court to reconsider *Penn Central*. After all, that decision was rendered after the Court had been absent from takings law for half a century, having last visited the field in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Absent reconsideration, however, this Court continues to view *Penn Central* as its "polestar" in regulatory taking cases. (See *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 [O'Connor, J., concurring] [2001]). Thus, until the Court decides to devise a different test, the three *Penn Central* factors — economic impact, investment-backed expectations, and character of the government action — will continue to hold

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Echeverria, *Is the* Penn Central *Three Factor Test Ready For History's Dustbin?* 52 Land Use L. & Zon. Dig. 3 (2000).

sway. And, as the Court has repeatedly held, they are to be flexibly applied. (*Penn Central*, 438 U.S. at 124; *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg. Plan. Agency*, 535 U.S. 302, 322 [2002] [courts must weigh "all the relevant circumstances"]; *id.* at 326 [Court has "eschewed any set formula"].)

Rather than considering all parts of this tripartite formula, the Ninth Circuit focused only on the "economic impact" factor and then applied it in a hopelessly rigid way. As the Petition amply demonstrates, the Ninth Circuit held that the only way to apply this factor is to determine a before and after value for the property. In this case, the court concluded that because the "after" value of the property had maintained its general value, there could not have been any taking of the use of Colony Cove's money during the interim.

First, that analysis is wrong on its own premise. Economic impact encompasses more than a simple-minded before and after comparison. To say that the property retained its general value wholly ignores the lost value during the period of governmental interference. That flies in the teeth of *First English*, which held clearly that compensation is due for the period of time during which the regulation's validity is litigated. (482 U.S. at 306-307.)

Second, the Ninth Circuit also ignores Colony Cove's "distinct, investment-backed expectations." As shown by the uncontradicted evidence, the City's regulations at the time Colony Cove purchased the property allowed consideration of the interest on an investment loan and that it was

reasonable for Colony Cove to believe that interest would be considered when it sought a rent increase. But it was not.

Third, the final *Penn Central* factor is the character of the governmental action. Here, that character took the form of changing the rules after Colony Cove bought the property. As the jury found — unanimously — that the City's action took property that it should have compensated for, the evidence also supports a conclusion that the City's changing the rules was a bad faith action that should have been accounted for. As the Court said in *Tahoe-Sierra*, bad faith action by the government would satisfy the *Penn Central* formula. (438 U.S. at 333 [no bad faith finding there because trial court expressly found good faith].)

The Ninth Circuit simply disregarded the plain meaning of the *Penn Central* factors.

II
THE CONSTITUTION REQUIRES JUST COMPENSATION FOR *ALL* TAKINGS. THUS, THE ISSUE IS *NOT* WHETHER PROPERTY WAS TAKEN TEMPORARILY, BUT WHETHER IT WAS TAKEN AT ALL.

The Ninth Circuit erred conceptually when it decided to focus on the nature of the taking as being "temporary" rather than "permanent." That utterly disregards this Court's decision in *First English*, which concluded simply and directly: "temporary takings which, as here, deny a landowner all use of his property, are not different

in kind from permanent takings, for which the Constitution clearly requires compensation." (482 U.S. at 318.) In *First English*, the Court took direct aim at government regulatory action that took the use of private property for any period of time. That, held the Court, would require compensation because "invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy." (482 U.S. at 322.) Compensation for the lost use of the property while the regulation precluded use of the property was held constitutionally mandatory. To label a taking as permanent or temporary is irrelevant, as the two are "not different in kind." (*First English*, 482 U.S. at 318.)[4]

First English built on an odd dissenting opinion (odd because five Justices agreed on its substance) in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 657 (1981) (Brennan, J., dissenting).[5] As summarized there:

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[4] Five years before *First English*, the Court held that a permanent physical invasion was a *per se* taking. (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419,[1982].) Five years' more experience allowed the Court to conclude in *First English* that *all* takings were analytically alike under the Fifth Amendment.

[5] Three other Justices signed Justice Brennan's dissent. In addition, although Justice Rehnquist concurred with four other Justices that the case was not final, he then noted his agreement with Justice Brennan's group of four on the merits. (450 U.S. at 633 [Rehnquist, J., concurring].)

> "The fact that a regulatory 'taking' may be temporary, by virtue of the government's power to rescind or amend the regulation, does not make it any less of a constitutional 'taking.' Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable. Nor does the temporary reversible quality of a regulatory 'taking' render compensation for the time of the 'taking' any less obligatory. This Court more than once has recognized that temporary reversible 'takings' should be analyzed according to the same constitutional framework applied to permanent irreversible 'takings.' "

Decades earlier, this Court had noted the unfairness that can occur "when the Government does not take [a property owner's] entire interest, but by the form of its proceeding chops it into bits, of which it takes only what it wants, however few or minute and leaves [the property owner] holding the remainder, which may be altogether useless to him . . . ." (*United States v. General Motors Corp.*, 323 U.S. 373, 382 [1945].) In *General Motors*, this Court addressed the compensation due when the government took temporary occupancy of property. Carefully parsing the words of the Fifth Amendment, the Court concluded first that "property" included all interests an individual might hold, and then decided that determining what has been "taken" is based on "the deprivation

of the former owner rather than the accretion of a right or interest to the sovereign . . . ." (323 U.S. at 378.) There, what was taken was an estate for years, i.e., a temporary deprivation of the right of use. So, here, what the City's change of rules accomplished was to take Colony Cove's right to use its property in an economically productive way.

The idea that use is a key right in the property rights bundle is not restricted to takings law. As this Court concluded in a tax case:

> "We have little difficulty accepting the theory that *the use of valuable property . . . is itself a legally protectible property interest.* Of the aggregate rights associated with any property interest, the right of use of property is perhaps of the highest order." (*Dickman v. Commissioner*, 465 U.S. 330, 336 [1984]; emphasis added.)

In *Kirby Forest Indus., Inc. v. U.S.*, 467 U.S. 1, 14 (1984), the Court held that "curtailment" of the "ability to derive income" from property may give rise to a Fifth Amendment taking. Moreover, the Court has repeatedly framed its test for a regulatory taking in terms of the ability of property owners to *use* their property.[6]

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[6] *Penn Central*, 438 U.S. at 124; *Kaiser Aetna v. United States*, 444 U.S. 164, 174 n. 8 (1979); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *San Diego Gas*, 450 U.S. at 653 (1981) (Brennan, J., dissenting); *Schad v. Borough of Mount*

Thus, the real question is whether a taking has occurred, and that depends on the impact of the governmental action on the ability of the owner to make economically productive use of the property. Justice Holmes put it quite directly for this Court shortly after the turn of the last century, saying "the question is, What has the owner lost?" (*Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 [1910].)

If, as this Court has repeatedly held, the Constitution is concerned with the pragmatic impact of government action on citizens, then the mode of infliction is not determinative. If the action is severe enough to be a taking, then it remains a taking even if it lasts only for a finite period of time.

Here, the Ninth Circuit confronted a City regulation that took the use of Colony Cove's investment. What cannot be overlooked — but which the Ninth Circuit sought to sidestep — was that the City's sudden rule change that prevented Colony Cove from recouping the cost of its investment was precisely the kind of temporary

Ephraim, 452 U.S. 61, 68 (1981); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 296 (1981); *United States v. Riverside Bayview Homes*, 474 U.S. 121, 126 (1985); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987); *Lucas*, 505 U.S. at 1015; *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725, 736, fn. 10 (1997); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 700 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

taking condemned by *First English*. See also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

III
ASIDE FROM ITS CONFLICTS WITH DECISIONS OF *THIS* COURT, THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER LOWER COURTS, CREATING CONFUSION THAT REQUIRES THIS COURT'S REVIEW TO RESOLVE.

The Petition for Certiorari aptly points to the conflict between the Ninth Circuit and the Court of Appeals for the Federal Circuit on the precise interest issue at the heart of this case. Another such case in the Eleventh Circuit held that "[i]n the case of a temporary regulatory taking, the landowner's loss takes the form of an injury to the property's potential for producing income or an expected profit." (*Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 271 [11th Cir. 1987].) That is an apt description of what happened here. But there is more.

As the Federal Circuit Court of Appeals put it more recently, "[n]othing in the language of the Fifth Amendment compels a court to find a taking only when the Government divests the total ownership of the property; the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests." (*Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1568 [Fed. Cir. 1994].) The opinion below conflicts with other lower court opinions as well. For example, in

Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 800 (Fed. Cir. 1993), the court acknowledged that, under *First English*, "a taking, even for a day, without compensation is prohibited by the Constitution." Both that conclusion and the one below cannot coexist.

Other courts agree with *Tabb Lakes*. For example, in *Cumberland Farms, Inc. v. Town of Groton*, 247 Conn. 196 (1998), the town denied a variance. Notwithstanding that the property owners retained some use of the service station on their property, the Connecticut Supreme Court held that they could pursue compensation for a temporary taking of their property during the time that it took to litigate the invalidity of the town's denial. The court expressly noted that the town's argument was "contrary to the holding of *First English* . . . ." (247 Conn. at 196.)

In *Eberle v. Dane County Bd. of Adjustment*, 227 Wis.2d 609 (1999), the county denied an access permit. The Wisconsin Supreme Court held that the owners could pursue compensation for a temporary taking, notwithstanding that they regained full use of their property when that court eventually overturned the permit denial. The court expressly concluded that the county's argument against compensation was contrary to both *First English* and *Lucas*. (227 Wis.2d at 633.)

Likewise, in *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401 (Neb. 1994), the Nebraska Supreme Court rejected the city's argument that it should not be liable for a temporary taking because all use of the property had not been taken, by

referring to "the line of cases which recognizes relief is possible from regulatory takings which do not deprive the owner of all economic use of the property." (515 N.W.2d at 407.) Finally, on remand from this Court's decision in *Lucas*, the South Carolina Supreme Court held that a temporary taking had occurred as a matter of law. (*Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484 [1992].) This, in spite of the fact that Mr. Lucas could still "picnic, swim, camp in a tent, or live on the property in a movable trailer." (*Lucas*, 505 U.S. at 1044 [Blackmun, J., dissenting].)[7]

In *Lomarch Corp. v. Mayor of Englewood*, 237 A.2d 881 (N.J. 1968), the court held that if government wanted to freeze the use of property for one year while deciding whether to acquire it, it had to compensate the owner, equating the action with the purchase of an option on the private market. Similarly, in *Seawall Associates v. City of New York*, 544 N.Y.S.2d 542 (N.Y. 1989), the court held that a five-year moratorium on converting low rent housing into anything else was a taking. The court found the ordinance facially invalid as a

[7] See also *Sintra, Inc. v. City of Seattle*, 829 P.2d 765, 774 (Wash. 1992) ("a temporary taking is compensable under the Fifth Amendment, and Sintra need not prove that the property remained unusable after the [regulation] was invalidated. [Citing *First English*.]"); *614 Company v. Minneapolis Community Dev. Agency*, 547 N.W.2d 400, 406-407 (Minn. App. 1996) (reduced occupancy of building sufficient to state claim for temporary taking where complaint alleged that remaining uses were not economically viable).

drastic interference with the owners' "*right to use* their properties as they see fit" (544 N.Y.S.2d at 549; emphasis, the Court's) and a taking of their right to develop their properties (544 N.Y.S.2d at 550).[8] In *Nolan v. Newtown Township,* 49 Pa. D. & C. 4th 148 (2000), a landowner sued when the township instituted an 18-month moratorium on subdivisions while it contemplated changes in its ordinance. The court held that he properly stated a claim under *First English* and set the matter for valuation. Those cases involved taking the "immediate" right to use.

That some takings may last only for temporary periods of time is a factor that affects only the amount of compensation due, not the existence of a taking. See *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1583 (Fed. Cir. 1993) ["The limited duration of this taking is relevant to the issue of what compensation is just, and not to the issue of whether a taking has occurred."]; *Hendler v. United States*, 952 F.2d 1364, 1376 (Fed. Cir. 1991) ["[T]he fact that [the government's] action was finite went to the determination of compensation rather than to the question of whether a taking had occurred"].

In *Hendler* (in an opinion written by Judge Plager, who had spent his formative years as a property professor) the court explained why

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[8] See also *Keystone Assocs. v. Moerdler*, 278 N.Y.S.2d 185 (N.Y. 1967) (invalidating an uncompensated 180-day delay on the right of the purchasers of the old Metropolitan Opera House to demolish and redevelop the property).

permanent and temporary takings are jurisprudentially the same:

> "Part of the difficulty here is the confusion that arises in the cases and commentaries over the use of the term 'temporary taking.' The argument in *Agins*, which was finally laid to rest in *First Lutheran Church*, was that a regulatory taking, unlike a physical taking, is by its nature 'temporary.' This is because the government, upon being told the regulation was overly intrusive and therefore a taking (by whatever test), could rescind or amend the regulation.
>
> "It is equally true, however, that the government when it has taken property by physical occupation could subsequently decide to return the property to its owner, or otherwise release its interest in the property. Yet no one would argue that that would somehow absolve the government of its liability for a taking during the time the property was denied to the property owner. All takings are 'temporary,' in the sense that the government can always change its mind at a later time, and this is true whether the property interest taken is a possessory estate for years or a fee simple acquired through condemnation, or an

> easement of use by virtue of a regulation." (*Hendler v. United State*s, 952 F.2d 1364, 1376 [Fed. Cir. 1991].)

Cases from appellate courts throughout the country are contrary to the Ninth Circuit's decision below. This Court's attention is sorely needed to resolve the conflicts.

IV
CHANGING THE RULES WHILE THE GAME IS IN PROGRESS VIOLATES SACRED AMERICAN TENETS.

A prime American precept is that we don't change the rules while the game is in progress. There are good reasons for that, with their origins in the idea that people should be able to rest secure that what is theirs when they go to sleep will still be theirs when they wake up. As Professor Callies put it, "The point is simple: the Constitution, not ever-evolving policy considerations, should inform the Court's opinions."[9]

The Court has referred to this as the "norm of regularity in governmental conduct," citing numerous circumstances in which it has occurred. (*Black v. Romano*, 471 U.S. 606, 622 [1985] [Marshall, J., concurring] [citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 [1954] [Government bound by its own regulations]; *Vitek v. Jones*, 445 U.S. 480, 489 [1980] [due process

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9 David Callies & Calvert G. Chipchase, *Moratoria and Musings on Regulatory Takings*, 25 U. Haw. L. Rev. 279, 282 (2003).

interest created by " 'objective expectation, firmly fixed in state law' "]; *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 467 [1981] [Brennan, J., concurring] [liberty interests arise from "statute, regulation, administrative practice, contractual arrangement or other mutual understanding [that establish] that particularized standards or criteria guide the State's decisionmakers"]; *Motor Vehicle Manufacturers Assn. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 [1983] [reasoned explanation required for agency revocation of validly promulgated rule]; *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808 [1973] ["There is . . . at least a presumption that policies will be carried out best if the settled rule is adhered to"]).

In short, we don't change the rules while the game is in progress. If change results in a taking of property, then compensation must be paid. (*Kaiser Aetna v. United States* 444 U.S. 164, 180 [1979].)

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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